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# Objection to Jurisdiction Raised in Answer--Getting an Early Disposition

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errors by the reporter in the transcription of my [the witness'] testimony." The court held that while it is permissible for a witness to make changes on a deposition before signing it, he must give "the reason therefor—either that it is an incorrect transcript or that his present recollection of the facts is more accurate—and he may then state what his corrected answer is and give any other explanation he desires with respect to his prior answer."

It has been the established procedure to permit a witness to make any changes in a deposition before signing it.[206] However, an omnibus statement as to the reason for correction will not be sufficient under the CPLR, whatever its acceptance was under the CPA. Rather, the transcript of the testimony should indicate what the original testimony was, what the corrected testimony is, and finally, whether the corrections are due to a challenge to the stenographer's accuracy or a desire on the part of the witness to change his testimony. There is prior case law to just that effect.[207] The reason for this requirement of specificity is obvious—if the accuracy of the stenographer is challenged, the party taking the deposition will put the stenographer on the witness stand to testify that he took the statement accurately[208] and thereby raise a question of credibility. In addition, this procedure will enable the trial court to compare the original form of the answer with the corrected answer to determine which one should be credited.[209]

## ACCELERATED JUDGMENT

### *Objection to Jurisdiction Raised in the Answer — Getting an Early Disposition*

In *Kukoda v. Schneider*,[210] a personal injury action, defendant objected to the court's jurisdiction by way of an affirmative defense in his answer, a CPLR procedure unknown to the CPA. Plaintiff then moved to dismiss the affirmative defense on the ground that no defense was stated.[211] The court held that although the

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[206] *E.g.*, Skeaney v. Silver Beach Realty Corp., 10 App. Div. 2d 537, 201 N.Y.S.2d 163 (1st Dep't 1960); Columbia v. Lee, 239 App. Div. 849, 264 N.Y. Supp. 423 (2d Dep't 1933); Gottfried v. Gottfried, 197 Misc. 562, 95 N.Y.S.2d 561 (Sup. Ct. 1950); Hayes v. City of N.Y., 98 N.Y.S.2d 424 (Sup. Ct. 1950); American Worcestershire Sauce Co. v. Armour & Co., 194 Misc. 745, 87 N.Y.S.2d 738 (Sup. Ct. 1949).

[207] Mansbach v. Klausner, 179 Misc. 952, 40 N.Y.S.2d 647 (Sup. Ct. 1943).

[208] *Id.* at 953, 40 N.Y.S.2d at 648.

[209] Columbia v. Lee, *supra* note 206, at 850, 264 N.Y. Supp. at 424.

[210] 41 Misc. 2d 308, 245 N.Y.S.2d 271 (Sup. Ct. 1963).

[211] CPLR R. 3211(b).

CPLR has made no express provision for the immediate determination of a jurisdictional objection when raised by the defendant in his answer rather than by motion, an immediate determination was obviously necessary to avoid prejudice to the plaintiff by compelling him to wait until the trial for its adjudication. If the CPLR did not permit early disposition of such a defense, the plaintiff would be confronted with serious statute of limitations problems, as will be treated shortly.

The problem in *Kukoda* would not have arisen had the defendant raised his objection by motion, which he also has a right to do.[212] The issue, then, would have been before the court immediately. Affidavits may be submitted on the motion.[213] Rule 3211(c) expressly provides for that, and further provides that such evidence may consist of any materials that may properly be considered by the court on a motion for summary judgment. The court may even treat the motion, which is made under rule 3211, as one for summary judgment or, if a triable issue of fact exists, the court is empowered to order an immediate trial of such issue. The latter procedure, provided for by rule 3211(c), differs from that on a motion for summary judgment, where the court must deny the motion if it appears that there is a genuine factual dispute requiring a trial.[214] Rule 3211(c) thus affords the tools requisite to an accelerated determination of a defense based on lack of jurisdiction even though the relevant facts be in dispute.

In view of the congested court calendars, especially in negligence cases, the court's determination in *Kukoda* enables a plaintiff to avoid the substantial prejudice which would necessarily result to him if he were compelled to wait for a number of years before the jurisdictional question would be decided at the trial.[215] The prejudice relates chiefly to the statute of limitations. If the jurisdictional point could not be resolved until the trial, and the trial was years away, the sustaining of the objection at the trial would find the plaintiff barred from commencing a new action on the same cause because the statute of limitations would usually have expired. There is *no* extension of the statute of limitations under Section 205 of the CPLR, relating to the termination of a prior action, when such prior action was dismissed for lack of jurisdiction of the defendant's person.[216] That is most important

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[212] The defendant may raise his jurisdiction objection by motion or answer. CPLR Rr. 320(b), (c); 3211(a)(8)-(9), (e).

[213] CPLR R. 3211(c).

[214] CPLR R. 3212(b).

[215] See Zedick v. Anderson, (Sup. Ct. Bronx County), 151 N.Y.L.J., April 3, 1964, p. 13, col. 8.

[216] Knox v. Beckford, 258 App. Div. 823, 15 N.Y.S.2d 174 (3d Dep't 1939), *aff'd*, 285 N.Y. 762, 34 N.E.2d 911 (1941). See Smalley v. Hutcheon, 296 N.Y. 68, 70 N.E.2d 161 (1946).

to note because the no-extension rule appears not in the text of section 205, but in judicial interpolation. And even if the original period of limitations is still alive, so that the plaintiff does not require a section 205 extension, he would still sulfer prejudice, *e.g.*, the loss of witnesses or their failure to recollect.

In another recent case, *Vazzano v. Horn*,[217] the court held that although the Revisers did not anticipate that rule 3211(b) would be used to dispose of a dispute over service, the motion must be held to lie in order to avoid the consequence of the long delay that would result if the objection, taken by answer rather than by motion at the defendant's option, were not reached until trial.

Note also that the court permits affidavits and other proof on the motion, which means, very simply, that the defense need *not* (despite the language of rule 3211(b), which might be construed to the contrary) be defective on its face. Thus, rule 3211(b) may test the factual or evidentiary basis, as well as the legal bases, of the defense or claim.[218] This case resolves one of the most serious dilemmas initially posed by the CPLR.

*Motion to Dismiss for Nonjoinder of an Indispensable Party*

In *Polar Distribs., Inc. v. Granger Realty Corp.*,[219] which involved an action to foreclose a mechanic's lien, defendant moved to dismiss the complaint on the ground, *inter alia*, that the court should not proceed in the absence of a person who should have been made a party.[220] The court denied defendant's motion and held that before a motion to dismiss for nonjoinder of an indispensable party pursuant to Rule 3211(a)(10) of the CPLR may be granted, it is a condition precedent that the defendant make a prior motion to have the indispensable party joined in the action.

Under prior practice a motion to dismiss the complaint for nonjoinder could not be made in the first instance.[221] Two motions were necessary. Defendant had to move, first, for an order directing the plaintiff to join the omitted party within a specified time and if such order was not complied with, he might *afterwards* move, second, to dismiss the complaint.[222] It was

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217 Vazzano v. Horn, (Sup. Ct. Kings County), 151 N.Y.L.J., Feb. 19, 1964, p. 19, col. 1.

218 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 3211.01, 3211.46 (1964).

219 (Sup. Ct. Queens County), 151 N.Y.L.J., Feb. 21, 1964, p. 20, col. 1.

220 CPLR R. 3211(a)(10).

221 RCP 102; CPA §§ 192-93.

222 Wolff v. Brontown Realty Corp., 281 App. Div. 752, 118 N.Y.S.2d 74 (2d Dep't 1953); Marisco v. Tramutolo, 135 N.Y.S.2d 258 (Sup. Ct. 1954); Marrero v. Levitt, 152 N.Y.S.2d 802 (Munic. Ct. 1956).